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In The

SUPREME COURT OF THE UNITED STATES

NO. 71-848

FRANK J. TEDESCO,
Petitioner,

vs.

THE CINCINNATI GAS & ELECTRIC COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit entered 29 September, 1971, petition for rehearing denied 5 November, 1971.

OPINIONS BELOW

The opinion of the District Court for the Southern District of Ohio, Western Division, overruling respondent's motion for judgment notwithstanding the verdict and for a new trial is not reported and is printed in Appendix A hereto. The opinion of the Court of Appeals will be reported in 448 F. 2d 332 and is printed in Appendix B. The order of the Court of Appeals denying rehearing is not reported and is printed in Appendix C.

JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C. 1254 (1). Rule 19 (1) of the Rules of the Supreme Court of the United States provides:

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion indicate the character of reasons which will be considered:

'(a) . . .

'(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

QUESTIONS PRESENTED FOR REVIEW

1. May a Court of Appeals, constrained by the requirement to construe the evidence and inferences most favorably to the prevailing party at trial, reverse the verdict of a jury without according to said prevailing party such consideration?

2. May a Court of Appeals selectively consider from a record of trial that testimony or evidence which favors reversal of a jury verdict and not consider that testimony or evidence in the record contradictory to and inconsistent with the conclusions of the Court of Appeals?

CONSTITUTIONAL PROVISIONS AND STATUTES

1. Amendment VII of the Constitution of the United States:

> "In Suits at Common law, where the value and controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

2. Section 4101.11, Ohio Revised Code:

> Every employer shall furnish employment which is safe for the employees engaged therein, shall furnish a place of employment which shall be safe for the employees therein and for frequenters thereof, shall furnish and use safety devices and safeguards, shall adopt and use methods and processes, follow and obey orders, and prescribe hours of labor reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters. (125 O. L. Eff. October 1, 1953.)

3. Section 4101.12, Ohio Revised Code:

> No employer shall require, permit, or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide, and use safety devices and safeguards, or fail to obey and follow orders or to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe. No employer shall fail to do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees or frequenters. No such employer or other person shall construct, occupy, or maintain any place of employment that is not safe. (125 O. L. Eff. October 1, 1953.)

STATEMENT OF THE CASE

In October, 1963, the petitioner, Frank J. Tedesco, a journeyman electric lineman, was an employee of Hoosier Engineering Company, which had contracted with the respondent, The Cincinnati Gas & Electric Company, to do certain work providing for increased electrical service for respondent's customers. The petitioner's duties required him to work above the ground on telephone poles and with and in proximity to wires carrying electric current. Respondent required that electrical service be maintained during the construction. Further, the respondent provided all the materials for the job, including the poles, racks, wires, fuses, cut-outs and transformers being installed by petitioner and his crew. Respondent's employee, James Vest, was on the job regularly and he was charged with the responsibility to inspect the work and to see that it was performed by petitioner and his crew according to specifications. He was also required to make observations concerning safety and, to report any unsafe conditions he observed.

On October 10, 1963, while petitioner was in the process of descending a pole, after working on a transformer, he was confronted with an arcing and sparking condition which threatened his face and eyes. At this time he was moving through horizontally placed wires and had to unloosen his safety belt. The arcing condition blinded petitioner and he grabbed a wire for support expecting the fuse to blow and to cut off energy from the transformer to the point where the short circuit was occurring. Experts established that the fuse should have blown before the wire burned through and, specifically, it was established that the fuse should have blown in one second and the wire should not have burned through for 15 to 16 seconds. Petitioner, from his experience, expected that the fuse

would blow to save him and the line. Nevertheless, the fuse did not blow and the wire burned through allowing petitioner to be dropped forcibly to the ground, causing serious and permanent injuries.

At the time petitioner ascended the pole there was no sparking or arcing to indicate a short circuit producing ground between the wire and the rack. Although the wires laying on the metal rack affixed to the pole from which petitioner fell were energized when he started to climb the pole, he was not aware of that fact. There would not have been a short circuit and no danger to the petitioner as long as the integrity of a neoprene covering on the wire was maintained and unless this neoprene covering was pierced. Immediately following petitioner's injury, some of his co-workers and representatives of the respondent and Hoosier observed burrs and prongs on the rack, apparently from excess galvanizing material and a burned area at the level of the rack where the wire had burned through. This rack was subsequently removed by the inspector and safety man, Vest, and was never seen again.

Respondent's safety supervisor, Riemar, and an official of Hoosier, Cottrell, established in their testimony and from Safety Rules and Regulations identified and accepted by them, that it was fully anticipated that personnel in the same category as petitioner would and could work on wires entergized to the extent that the wires upon which petitioner was working were energized, without prior insulation. As a matter of fact, Vest, the inspector and safety man, and Cottrell, ordered one of petitioner's co-workers to remove the rack after the accident without any prior requirement that the line be de-energized. In other words, under the direct supervision and control of respondent's employee, one of petitioner's co-workers was directed to work in the same area and under the same circumstances as was petitioner without any different precaution.

The fuse which did not blow until after petitioner had fallen was inserted into an appliance known as a "cut-out." Respondent's witnesses testified that that appliance was designed to carry a 25 amp fuse and that no other fuse could be installed. Further, they testified that it was impossible to get a 100 amp fuse into the cut-out and also that, since there were no 100 amp fuses called for on the job, none would have been present. It was likewise established that the fuses supplied by the respondent were not marked as to amperage.

It was without dispute in the case that the energy supplied to the line where respondent was working was not disrupted at a time and under circumstances when it should have been disrupted, in which event no injury would have befallen the petitioner. The following clear inferences were more than amply justified from the record:

1. That inspection by respondent's employee, Vest, would have or should have revealed the defective portion of the rack on which respondent worked.

2. That inspection by respondent's employee, Vest, would have or should have revealed any improper fusing or fusing inconsistent with the specifications which he was charged to fulfill.

3. That respondent's employee, Vest, in his capacity as a safety man should have observed any practices or conditions which were unsafe.

4. That the burrs and prongs on the rack pierced the neoprene covering on the wire to permit the ground causing short circuit.

5. That the fuse supplied by respondent was unmarked.

6. That the fuse inserted into the cut-out was either too large or otherwise defective.

7. That the cut-out itself was defective.

8. That the transformer was defective.

At the conclusion of the plaintiff's case at trial, and again at the conclusion of the defense case, respondent moved for a directed verdict. Before the case was submitted to the jury the trial court instructed on all the relevant issues and it is significant that at no time did respondent raise any question or complaint about the court's charge. Specifically the Court charged on the issue of negligence, contributory negligence, proximate cause and damage. Included within the court's charge were instructions concerning Ohio's "Safe Place to Work" Statutes (Sec. 4101.11 and 4101.12, Ohio Revised Code). After deliberation the jury returned a verdict in favor of the petitioner in the sum of Eighty One Thousand ($81,000.00) Dollars.

In a decision filed September 29, 1971, the Court of Appeals reversed the District Court and dismissed the complaint. After stating that:

> "No one knew in which respect the jury found that the place to work was not reasonably safe considering all of the hazards." (App. B, p. 31)

It stated:

> "We conclude that there is no liability on the part of C.G.&E., and that the District Court erred in denying its motions for a directed verdict." (App. B, p. 32)

Jurisdiction of the District Court was founded on diversity and amount. At the time of filing suit and at all times thereafter petitioner was a resident and citizen of Florida and respondent was an Ohio Corporation.

THE REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals should be reviewed for the following reasons:

1. The failure of the Court of Appeals to follow the

established Federal and Ohio law pertaining to judicial review and in ignoring its own and other Ohio precedent so far departs from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision.

2. The act of the Court of Appeals in reversing the jury verdict effectively deprived the petitioner of his right to a trial by jury as guaranteed by Amendment VII, Constitution of the United States.

3. This case involves an important and novel question of Federal law which has not been, but which should be settled by this Court.

I.

The settled federal law, as well as the law of the State of Ohio, demands that, during trial, the person against whom a motion for directed verdict is made is entitled to have the evidence construed most favorably for him and is entitled to the benefit of all reasonable inferences which could have been drawn from the evidence. *Hamden Lodge* v. *Ohio Fuel Gas Co.*, 127 O.S. 469, 189 N.E. 246; *Kellerman* v. *Durig*, 176 O.S. 320, 199 N.E. 2d 562, and *Massey* v. *McGraw*, 233 F. 2d 905 (C.A. 6th, 1956).

Similarly, following trial, "The reviewing court must view evidence in a light most favorable to the appellee after a verdict for the appellee." *Pearl Assurance Co. Ltd.* v. *Stacey Brothers Gas Construction Co.*, 114 F.2d 702 (C.A. 6th, 1940); *United States Steel Co.* v. *Olewinski*, 235 F. 2d 326 (C.A.6th, 1956).

The sole issue made on appeal to the Court of Appeals by the respondent was whether there was substantial evidence to justify submission of the cause to a jury. The decision of the Court of Appeals resulted in the relatively seldom determination that there were absolutely no factual

issues upon which a verdict for the plaintiff could be rightly premised and the action was dismissed. In effect, this decision concluded that the evidence at the trial level was "so overwhelmingly against the plaintiff's contention as to leave no room to doubt that a fact is not what the plaintiff (claimed) it to be." *Lovas* v. *General Motors Corp.*, 212 F.2d 805, 807 (C.A. 6th, 1954); *Price* v. *Firestone Tire & Rubber Co.*, 321 F. 2d 725 (C.A. 6th, 1963). At the same time when confronted with the motion for a directed verdict, or for a judgment notwithstanding the verdict, the trial court was required, under the proscriptions of the Federal and the Ohio law to consider as admitted all the facts which the evidence tended to prove and to construe the evidence most strongly in favor of the petitioner. *Hammond Lodge* v. *Ohio Fuel Gas Co. (supra); Baltimore & Ohio Railroad* v. *Henery*, 235 F. 2d 770 (C.A. 6th, 1956). A reviewing court has the same obligation. *Gallaway* v. *United States*, 63 S. Ct. 1077, 319 U.S. 372, 87 L. ed. 1458. The trial court carefully considered the motions made by the respondent during and after trial and was constrained to state that:

> ". . . this court adheres to the view that the evidence in this case justified submitting the questions of 'control' and 'safe place to work' to the jury . . ." (App. A, p. 20)

This Court has frequently stated the following principle:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact finding body. It weights the contradictory evidence and inferences, judges the credibility

> of witnesses, receives expert instructions and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable." *Tennant v. Peoria & PUR Company*, 321 U.S. 29.

In the opinion of the Court of Appeals in this case it was stated:

> "With respect to control, the only evidence offered by plaintiff was the contract and the fact that CG&E supplied specifications, materials and equipment and regularly inspected the work." (App. B, p. 28)

Further, the Court of Appeals stated in the order denying rehearing:

> "In that case (referring to *Parsons*) (*post*) unlike the present case, there was sufficient evidence on the issue of control to make it a decision of fact for the jury to determine." (App. C, p. 33)

In clear contradiction to these conclusions by the Court of Appeals the following evidence was introduced and admissions made during trial and on appeal:

1. The proposal leading to the contract undertaken by Hoosier for this particular job stated that the work was to be done "on your (CG&E) overhead lines."
2. The contract between Hoosier and respondent indicated that the lines upon which petitioner was working belonged to respondent.
3. All materials were supplied by the respondent, as found by the Court of Appeals.
4. The respondent had an inspector and safety man on the job.
5. The respondent took possession of and removed the rack involved in the accident which raises a presumption of control. *Lebanon* v. *Schwartz*,

4 O.A. 173 (1915); *East Ohio Gas* v. *Van Orman*, 41 O.A. 56, 179 N.E. 147 (1931)

6. The purchase order from respondent to Hoosier creates very specific rights of the respondent to exercise dominion and supervision over Hoosier's personnel and work approach.
7. The respondent used the electrical system upon which petitioner was working during the same period of time petitioner and his co-employees were working on the lines.
8. In closing argument before the jury, respondent's attorney stated:
   "I am proud of the fact that there has been a certain amount of control by the Cincinnati Gas & Electric people on this job."
9. Respondent admitted in its brief before the Court of Appeals that the injury occurred on "defendant's (CG&E) premises."

It is inconceivable that on the foregoing information, even without a liberal interpretation of the evidence, that the Court of Appeals could criticize the submission of the issue of control by the trial court to the jury and the finding by the jury that there was such control as an essential ingredient of petitioner's case. One of the primary authorities upon which petitioner relied at trial was *Parsons* v. *Blount Bros. Construction Company*, 281 F. 2d 414 (C.A. 6th, 1960). This case stands squarely for the proposition that the mere presence of a safety man on the job is enough to establish at least a question for the jury concerning control. The author of the opinion in this case wrote in his opinion in the *Parsons* case *(supra)* as follows:

> "Plaintiff had only sought to show that the defendant controlled safety features in abatement of hazards. If this were true it would be immaterial that defendant did not have control over other aspects as to the method of carrying out the work, exclusive of safety." (*ibid*, 417)

Nevertheless, this precedent, which is still the law, was not followed.

In addition to establishment of control in the respondent, it was the petitioner's theory throughout the trial that one or more of the items of equipment supplied by the respondent was faulty and, further, that respondent was also negligent through its employee, Vest, on the proposition that he was an inspector who did not inspect, and a safety man who did nothing about safety. In its opinion, the Court of Appeals, not considering the record as a whole, but being extremely selective in the items of evidence it considered, made the following statements:

1. It was of Hoosier's crew of four who inserted a 100 amp fuse, which was the wrong fuse. (App. B, p. 24)
2. The undisputed testimony from Hoosier crew members was that they installed the 100 amp fuse in the cut-out for the transformer (*ibid,* p. 25)
3. In so doing they disregarded the written specifications (*ibid*).
4. In view of the positive testimony of plaintiff's own witnesses, there was clear proof that Hoosier crew members were negligent in installing a fuse of the wrong amperage (*ibid*).
5. It was a Hoosier crew member who installed the wrong fuse in the cut-out box (*ibid*).

On the other hand, it was the respondent's contention through trial that:

1. There were no 100 amp fuses specified for the job.
2. There were no 100 amp fuses on the job at all.
3. The cut-out box was designed for 25 amp fuse and not 100 amp fuse.
4. A 100 amp fuse could not be inserted into the cut-out box.
5. Fuses supplied by the defendant were not marked.

Certainly it was the jury's prerogative to conclude that if a 100 amp fuse was in the cut-out box and failed to function when the short circuit occurred, it was because either a wrong sized, unmarked fuse was supplied by respondent, or that the cut-out itself was defective to accept a wrong sized fuse, or that there was a defect in the fuse, or in the transformer. Further it was the prerogative of the jury to find that the respondent, who had reserved to itself the right to inspect and make certain that specifications were fulfilled and who had also assumed safety responsibilities consistent with those recognized in the *Parsons (supra)* case, failed in that responsibility. It is still the law that where there is an evidentiary basis for a jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. *Lavender* v. *Kurn,* 66 S. Ct. 740, 327 U.S. 645, 90 L.ed. 916.

Returning again to the *Parsons* decision *(supra),* it was said:

> "It was for (the jury) to decide whether the conditions heretofore discussed constituted a hazard which *Blount,* in the exercise of ordinary care, could have eliminated" (*ibid,* 418).

The same standard should have been applied in this case.

In the case of *American Steel & Wire Co.* v. *Sieraski,* 119 F. 2d 709 (C.A. 6th, 1941), the Court considered not only the common law principles which govern this particular case, but also Ohio "safe place to work" statute. In the *American Steel & Wire Co.* decision, the Sixth Circuit quoted as follows from an earlier precedent:

> "We cannot doubt that under the circumstances here presented, the defendant owed to the plaintiff the duty of exercising reasonable care to keep the premises where he was working free from unusual and unnecessary obstruction and defects which would be likely

to cause him injury." *McGinty* v. *Pennsylvania Railroad Co.*, 6 F. 2d 514 at 515 (C.A. 6th, 1925).

Further, in the *American Steel & Wire Co.* case, the Court of Appeals stated that the duty of a person situated as was this respondent was to provide a person situated as this petitioner "with a place of employment which was as safe or free from danger as the nature of the employment would reasonably permit." (*ibid* 711).

It is not the province of the Court of Appeals in reviewing a case of this sort to attempt to select from the evidence and the record items which will support the decision to reverse. For example, in the order denying rehearing the Court belabors the testimony of one witness, Jackson, who did say that he examined the fuse after the accident and that it was a 100 amp fuse. Another witness, Sumner, testified that the fuses were not marked. The Court of Appeals accepted the one witnesses' testimony and rejected the other witnesses' testimony. This is the function of the jury. Respondent's theory during the trial was that there could be no 100 amp fuse on the job and, if there was, it would not fit into the cut-out. The Court states that, if respondent's contention concerning the lack of a 100 amp fuse was true "then there is no proof before the jury that the wrong fuse was used" (App. C). This conclusion by the Court does not, however, recognize petitioner's other claims or approach the basic issues in the case, the reason why the case was submitted to the jury, and the justification for the jury's finding in favor of the petitioner. One issue was whether the respondent fulfilled its duty of "exercising reasonable care to keep the premises where he was working free from unusual and unnecessary obstructions and defects which would be likely to cause him injury." *McGinty* v. *Pennsylvania Railroad Co. (supra).* Another was whether there were any "hazards which could be eliminated by

the exercise of ordinary care by those in custody and control of the premises." *Parsons (supra).* Another was whether the conditions on the job "constituted a hazard which (respondent) in the exercise of ordinary care could have eliminated." *Parsons (supra).*

With reference to its analysis of the record, the Court of Appeals in this case stated:

> ". . . the district court did not submit to the jury any of the specifications of negligence and charged the jury only on the safe place to work law. No one knows in what respect the jury found that the place to work was not reasonably safe, considering all of the hazards." (App. B, p. 31)

Rule 51, F.R.C.P. precisely outlines the responsibility of counsel with respect to instructions. It is not for the Court of Appeals to criticize the trial court for failing to give instructions where no request therefor was made. Neither is it for the Court of Appeals to take the position because it feels the trial court should have amplified the instructions, there was no basis in the evidence to support the conclusion which the jury reached. As this Court has stated:

> "Courts are not free to review the evidence to set aside the jury verdict merely because the jury could have drawn different inferences or conclusions, or because Judges feel that other results are more reasonable." *Tennant* v. *Peoria and Pur. Co.*, 321 U.S. at 35.

Besides choosing selectively and arbitrarily from the evidence and ignoring all of the other evidentiary conclusions which are reviewed in this memorandum, the Court of Appeals also gratuitously made comments which were neither raised on appeal, nor appropriate to discuss in the context of this particular case. For example, the Court said in the order overruling the petition for rehearing:

> "In our case, Tedesco and his employer, Hoosier, had just as much knowledge of the hazards as did CG&E." (App. C, p. 33)

and

> "It is clear that Tedesco had clear knowledge of the hazard involved in the installation of the poles and wires and that he did not utilize the safety equipment supplied to him by his employer for his own protection." (App. C, p. 34)

Referring again to Rule 51, F.R.C.P., it is significant to note that respondent has never complained about the instructions given by the trial court. These instructions included a comprehensive charge on contributory negligence, which issue the jury found in favor of the petitioner. This must be construed to mean, under the requirement that the evidence and inferences deriving therefrom must be considered most favorably to the prevailing party that the jury found that Tedesco did not have the knowledge of the hazards which CG&E had.

Reliance was had by the Court of Appeals on *Ford Motor Company* v. *Tomlinson*, 229 F. 2d 873 (C.A. 6th, 1956), an opinion written by Justice Stewart. This precedent is distinguished and has no application to this case for the same reason that it was distinguished in the *Parsons* and *American Steel & Wire Company* decisions. It was for the jury to determine whether or not the petitioner had knowledge of any hazards and, obviously, the jury found that he did not.

In the Court of Appeals decision there is also reference to the possible negligence of petitioner's co-workers. Under Ohio law any such negligence would not be attributable to the petitioner. *Wery* v. *Seff*, 136 O.S. 307, 25 N.E. 2d 692; *Larson* v. *Cleveland Railway Co.*; 142 O.S. 20, 50 N.E. 2d 163. Whether or not the jury may have deter-

mined that one of petitioner's co-employees was negligent, it did determine that the respondent was negligent, and it is fully responsible for any damage sustained by petitioner. Again, reference to this subject in the Court of Appeals decision is irrelevant and has no application to the issues in this case.

Petitioner sincerely urges that the action of the Court of Appeals in reversing and dismissing the jury verdict in his favor on the basis of the facts and the law is an unjust and unfair application of its prerogative on review. As was stated in the case of *Webb* v. *Illinois Central Railway Co.*, 77 S. Ct. 451, 352 U.S. 512, 1 L. ed. 2d 503.

> "The test of a jury case under the Act is whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the employee's injury."

Petitioner recognizes that some argument may be made that Federal Courts should distinguish between FELA cases and other negligence cases. There is no distinction, however, between the standards applied to gauge negligence in FELA cases, and in the Courts of the State of Ohio.

II.

Inherent in the result announced by the Court of Appeals in this case is the conclusion that this petitioner was actually denied his right to a jury trial. Throughout the entire proceedings at the District Court level, the rights of all parties were recognized and protected by an eminently capable trial judge. He pursued his responsibility carefully and under the law and his decision to submit the questions of fact to the jury was correct.

This Court has properly been concerned through the years with the individual rights of individual citizens but,

by the very nature of the problems, this concern has been directed more toward rights involving other constitutional guarantees rather than the right of an individual to a jury trial in a civil matter. At the same time, such trials ordinarily involve innocent and injured people as distinguished to some extent from matters involving criminal charges and similar matters. Those innocent citizens deserve the same consideration for their rights.

III.

For a number of years it has been evident that there are conflicts between the various courts of appeals concerning the standard of proof which those courts will apply in diversity cases. The spectrum ranges between absolute adherence to whatever the State standard of the jurisdiction might be on the authority of *Erie Railroad Co.* v. *Tompkins,* 58 S. Ct. 817, 304 U.S. 64, 82 L. Ed. 1188, to the application of some federal concept with variances in between. This Court, in *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.,* 78 S. Ct. 893, 356 U.S. 525, 2 L. Ed. 2d 953, and in *Simler* v. *Conner,* 83 S. Ct. 609, 372 U.S. 221, 9 L. Ed. 2d 691, seems to have indicated that the matter will be resolved by application of some Federal test. At the same time, this Court in *Dick* v. *New York Life Insurance Co.,* 79 S. Ct. 921, 359 U.S. 437, 3 L. Ed. 935, also stated that the standard which governs the sufficiency of evidence in a federal case based on diversity of citizenship has not been established. Referring to the preceding question presented in this petition, this Court has stated in *Simler (supra)*:

> "Only through a holding that they jury-trial right is to be determined according to Federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved." 83 S. Ct. 609 at 610."

Therefore, petitioner respectfully requests the Court to consider the importance of speaking to the question of the standard of proof to be applied in cases of this sort which standard, if applied by the Court of Appeals in this case, would have necessitated an affirmance of the trial court's action and the jury's verdict.

CONCLUSION

It is respectfully submitted to this petition for a writ of certiorari to be granted.

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APPENDIX "A"

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. 6025

FRANK J. TEDESCO,

Plaintiff,

vs.

THE CINCINNATI GAS & ELECTRIC CO.,

Defendant.

ORDER ON POST-TRIAL MOTIONS

(Filed October 12, 1970)

The defendant has moved

1) For Judgment Notwithstanding the Verdict
and
2) In the alternative, for a New Trial.

The motions have been carefully considered. All but one of the questions was heretofore considered and passed on during the trial. For the reasons advanced then, this Court adheres to the view that the evidence in this case justified submitting the questions of "control" and "safe place to work" to the jury, as well as "future" damage.

The motions are, therefore, overruled.

/s/ TIMOTHY S. HOGAN
United States District Judge

APPENDIX "B"

No. 71-1090

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK J. TEDESCO,
Plaintiff-Appellee,

v.

THE CINCINNATI GAS & ELECTRIC COMPANY,
Defendant-Appellant.

Appeal from United States District Court for the Southern District of Ohio, Western Division.

Decided and Filed September 29, 1971.

Before PHILLIPS, Chief Judge, WEICK and MCCREE, Circuit Judges.

WEICK, Circuit Judge. Plaintiff Tedesco was a journeyman lineman with more than twenty years' experience. He had handled work involving everything from 110 to 138,000 volts. At the time of his injury he was employed by Hoosier Engineering Company, an independent contractor, which company had a contract with defendant, Cincinnati Gas & Electric Company (CG&E), to replace certain electric light poles and wires in the area of Mainsville, Ohio. Hoosier had considerable experience in this type of work. It agreed to furnish all labor for the performance of the contract. CG&E prepared the specifications and agreed to and did furnish the poles, wires, racks, fuses, cut-outs and transformers. Hoosier also agreed to carry Workmen's Compensation, Employer's and Public Liability Insurance, and further agreed to —

". . . indemnify and save harmless the purchaser [CG&E] from and against all claims for personal injury and property damage arising out of any operation or work performed under this agreement."

The contract required Hoosier to install the new poles, lines and equipment beside the old poles so that when the work was completed the electric current could be readily transferred from the old to the new lines. The lines on the poles were primary and secondary; the primary lines carried 2400 volts. There was a transformer through which the current passed from the primary to the secondary lines to reduce the voltage in the secondary lines to 110 and 220 volts for home use.

CG&E reserved the right to inspect the work as it was being performed, and one of its inspectors did make frequent inspections during progress of the work.

Tedesco was one of a crew of four Hoosier employees who were performing this work. He climbed up one of the new poles which had been installed by the crew, to perform certain work. At that time the secondary lines had been strung but had been laid on top of the rack. They were required to be tied to ceramic insulated spools before the current was turned on for public use.

When Tedesco finished his work he started to climb down the pole and a short circuit or arc suddenly developed in the secondary wires. He testified that the new wires were not supposed to be energized. The arc temporarily blinded him; he grabbed one of the wires for support, which then separated, and he fell to the ground. He was not wearing his safety belt at the time. He testified that he did not know that the lines had been energized, but that one of his fellow-employees had turned on the electricity. If the secondary lines had been attached to the insulator spools no short circuit would have developed.

Tedesco sued CG&E in the District Court to recover damages for serious personal injuries which he sustained as the result of his fall from the pole. Jurisdiction was founded on diversity of citizenship. Tedesco had moved to Florida, and CG&E was a corporation authorized to do business in Ohio. The District Court submitted the case to a jury, which returned a verdict against CG&E in the amount of $81,000, upon which judgment was entered. CG&E appealed, asserting that the Court erred in denying its motions for a directed verdict, made at the close of plaintiff's evidence and at the close of all the evidence, and that the Court erred in denying its motion for judgment notwithstanding the verdict. The case is governed by Ohio law.

The complaint alleged that CG&E was negligent in the following respects:

1. In supplying a defective rack that had a burr on its surface which cut the insulation on the secondary wires;

2. In installing or causing to have installed in the transformer a fuse of amperage higher than was required, necessary or safe;

3. In failing to warn plaintiff of said defects;

4. In failing to exercise the care required in the handling and distributing of electric current.

In considering the charges of negligence, there can be no question that in the installation of the new poles, wires and equipment, Hoosier was engaged in work inherently dangerous, for high tension lines carrying 2400 volts are dangerous. Hoosier and its employee Tedesco had just as much knowledge of that danger as did CG&E. Because of the dangerous character of the work, CG&E could not delegate the performance thereof to an independent contractor and thereby relieve itself of liability for injury to the public due to the negligence of the independent contractor. *Richman Bros. Co.* v. *Miller,* 131 Ohio St. 424 (1936); 28

Ohio Jur. 2d 366, § 23. But this rule does not apply to liability of the owner to the independent contractor or his servants. CG&E cannot be held liable for injuries proximately caused to Tedesco by either the negligence of his fellow workers or his own contributory negligence. *Ford Motor Co.* v. *Tomlinson,* 229 F.2d 873 (6th Cir. 1956); *Schwarz* v. *General Elec. Realty Corp.,* 163 Ohio St. 354 (1955).

The rack which Tedesco claims was defective was not being put to its intended use by the Hoosier crew. That use was such that the secondary wires should have been tied to the insulator spools before the current was turned on. CG&E inspector Vest so testified.

Under Ohio law —

> "The duty of the owner or proprietor of a business to furnish appliances free from defects for the safety of invitees is limited to the defects from the intended use of those appliances." (Syl.) *Hooker* v. *Kroger Co.,* 12 Ohio App.2d 105 (1967); 39 Ohio Jur. 2d 586, § 64.

The next ground of negligence alleged was that CG&E had installed or caused to be installed in the transformer a fuse of amperage higher than was necessary or safe. The specifications called for a 25-amp. fuse. It was one of Hoosier's crew of four who inserted a 100-amp. fuse, which was the wrong fuse. Jackson, a crew member, who examined the fuse after the accident, testified that the amperage appeared on the top of the fuse.

Counsel for plaintiff made the following argument to the District Court on the subject of the fuse:

> "It could very well be that some one on Hoosier overfused this particular transformer but I think we are entitled to the presumption that no one else was negligent, and there has been no showing here, really, that this transformer wasn't properly fused."

The undisputed testimony from Hoosier crew members was that they installed the 100-amp. fuse in the cut-off for the transformer. In so doing, they disregarded the written specifications. In view of the positive testimony of plaintiff's own witnesses, there was clear proof that Hoosier crew members were negligent in installing a fuse of the wrong amperage. There was no evidence of any defect in the transformer. In the absence of proof we may not infer that there was a defect.

It was also contended by plaintiff that the secondary wires were coated with neoprene as an insulating material, and that this was defective. There was no evidence that the neoprene coating was defective. The proof was to the effect that the neoprene was used merely as a weatherproof coating for the wires. There was no evidence that it was practical or customary in the industry to insulate these wires. In any event, if, as plaintiff contends, there was a sharp burr on the rack, it could cut into the neoprene coating when the wires were pulled over it.

There was no evidence that CG&E had knowledge of the existence of any burr on the rack. None of the Hoosier crew members who installed the rack noticed the burr. Crewman Jackson, plaintiff's fellow employee, testified, "You would never notice it." Hoosier's Division Manager Cottrell inspected the rack after the accident and found nothing wrong with it other than the burn caused by the sparking of the wire.

Plaintiff's case then boils down to the undisputed facts that it was a Hoosier crew member who turned on the current, energizing the lines, before the wires were attached to the insulators. It was a Hoosier crew member who installed the wrong fuse in the cut-off box. Had the wires been properly attached to the insulators plaintiff would not have been injured.

However, there is more. Hoosier had provided safety

measures for its employees, which measures would have prevented the accident had they been used. Hoosier's Division Manager Cottrell testified:

> "Q All right. Now, with reference to the secondary lines that we have talked about, what were they required to do?
>
> A They are required, the journeyman layman, when they are working in a primary area, to cover all conductors that they might come in contact with, all paths to ground which could include your secondary and your primary. If you are working in this area and your feet or your legs are exposed to conductors, they are to be covered.
>
> Q And specifically what are they to be covered with?
>
> A They are to be covered with rubber protective equipment, which is, we term it, as a lineman hose. It's a rubber insulating hose. Well, they come in various lengths and they are open, slit, and they can open it and slide them on the conductor.
>
> Q Now, sir, is this protective equipment to be used whether the line is hot or not?
>
> A That is correct. Any ground that they might come in contact with they are to cover. That's basic, not only in our rules, but all rules; in the union's rules, the power company rules, and it's a basic knowledge of a lineman.
>
> MR. DREIBELBIS: No further questions, your Honor."

Paul Riemar, Superintendent of Safety and Training of CG&E, testified that these same safety procedures were standard and were used by CG&E.

The District Court did not submit to the jury any of the specifications of negligence charged in the complaint. Instead, in a colloquy with counsel he stated:

> "The Court: Now, insofar as what we are going to send to this jury, we are going to send it to them

solely on the frequenter, safe place to work, control. So that the issues for the jury will be the control over either the plaintiff or the location, that being one issue; the safety of the place being another issue of fact; and then of course, causal relationship, and another question will be the contributory negligence question."

With respect to the intended use of the rack, the Court stated:

"The Court: Well, the problem is easier to see with a ladder if a fellow is walking up a ladder while he is in its intended purpose, but we think they have to do two guesses on that. One was the intended purpose of this just as it was there, to hold a wire insulator. That's not intended to be used without the insulation."

The Court further said:

"THE COURT: If you took an automobile out and drove it across the lake you wouldn't have any product liability case because it went under, surely. Don't you go back to what was the intended use, if it failed while being used as intended by the manufacturer or by the provider?

"It's true we have testimony here that there are times when it's separated, but it's linked right up with it. There is no testimony here that anybody ever as a matter of course or any other way put a hot wire through there without using either an insulator or a cover. Every time you use the insulator you have got testimony of a cover, don't you?

"MR. BRESLIN: Not from Mr. Tedesco. He said he did it before. I mean you can't presume that he was negligent —

"THE COURT: I just think that's too late to take Mr. Tedesco's testimony and let a jury refer to that because somebody does something, some one person, that the provider intended that he do it that way.

Now you have got your record on it, but we are only going to send the safe place to work."

In his instructions to the jury the District Judge submitted to the jury the issue only whether CG&E had violated the Ohio "Safe Place to Work Act." Ohio Rev. Code 4101.11, et seq. After reading the statutes, including the definitions of employer, employee and frequenter, he instructed the jury as a matter of law that Tedesco was a frequenter, and that he was a CG&E employee, for the purposes of the Act. He instructed the jury that the burden was on plaintiff to establish that CG&E had custody and control of the premises; that CG&E had an obligation to make the place as free from danger as the nature of the employment would reasonably permit; and that a violation of that duty was the proximate cause of plaintiff's injury. He further instructed the jury on contributor negligence and damages.

It seems to us that since plaintiff did not prove any of the specifications of negligence charged against CG&E, there was nothing to submit to the jury.

With respect to control, the only evidence offered by plaintiff was the contract and the fact that CG&E supplied specifications, materials and equipment and regularly inspected the work. This in our judgment was insufficient to establish control. *Sullivan* v. *General Elec. Co.*, 226 F.2d 290 (6th Cir. 1955); *Kelly* v. *Ford Motor Co.*, 104 Ohio App. 185 (1957). There was no evidence that CG&E interfered with Hoosier's employees in the manner and means in which they performed their work.

In resisting CG&E's motion for a directed verdict, plaintiff's counsel argued:

"Mr. Breslin: Primarily, sir, although I mean in conjunction with any negligence — I may get to this, any negligence by a coemployee may be the negligence

> of — I am saying that maybe there is a situation in here where any negligence by a fellow employee may be the negligence of the Gas and Electric Company because they maintained such control over those crews. In other words, they are not immunized because of the Workmen's Compensation Statute, as is Hoosier but, nevertheless, these men could conceivably have been agents of the Cincinnati Gas and Electric Company."

The Court pointed out to counsel that if Hoosier's employees were in reality employees of CG&E, plaintiff's action would be barred by the Workmen's Compensation statutes of Ohio, the remedies under which are exclusive.

The Supreme Court of Ohio has considered the question of liability of an owner to an independent contractor's employees where real or potential danger is involved in the performance of the work. In *Wellman* v. *East Ohio Gas Co.*, 160 Ohio St. 103, 108 (1953), the Court held:

> "The rule of general acceptance is that where an independent contractor undertakes to do work for another in the very doing of which there are elements of real or potential danger and one of such contractor's employees is injured as an incident to the performance of the work, no liability for such injury ordinarily attaches to the one who engaged the services of the independent contractor."

This case amplifies the above statement though, in terms of the employee's knowledge:

> "Or, stating the matter a little differently, one who engages an independent contractor to do work for him ordinarily owes no duty of protection to the employees of such contractor, in connection with the execution of the work, who proceeds therewith knowing and appreciating that there is a condition of danger surrounding its performance." (160 Ohio St. at 108)

This rule was reiterated in *Schwartz* v. *General Elec. Realty Corp.*, 163 Ohio St. 354 (1955) (Syl. 1):

> "Where an owner of premises engages an independent contractor to do work thereon, an employee of the contractor while performing the work is on the premises impliedly as an invitee of the owner, and the owner owes the employee the duty of exercising ordinary care to maintain the premises in a reasonably safe condition for use, this duty not extending, however, to any inherent hazards necessarily present because of the character of work to be done."

Again, *Schwarz* discusses the concept of inherent hazard in terms of obvious danger to the contractor's employees:

> "It is apparent that this court in the *Wellman case* limited the rule, earlier announced in the *Bosjnak case*, to cases where the independent contractor and his employees enter upon the premises of the contractor's employer as his invitees, unaware and uninformed of hidden dangers on the premises which had been created by the employer or of which he had full knowledge. Here Duffy and its employees had consented to work in an obviously dangerous environment, and in so doing it was Duffy's lack of care, under the circumstances, which proximately caused plaintiff's injury." (163 Ohio St. at 360)

In *Ford Motor Co.* v. *Fomlinson;* 229 F.2d 873 (6th Cir. 1956), Circuit Judge, now Associate Justice, Stewart pointed out that the Ohio Safe Place to Work statutes "were obviously enacted primarily for the benefit of employees . . . They were rendered largely obsolete by the passage of the Ohio Workmen's Compensation Law." In reversing the judgment for the plaintiff and dismissing the complaint, Judge Stewart stated on page 880:

> "'Where the premises upon which construction work is to be performed by a contractor remains under

> the control of the principal employer while work is in the course of performance, a servant of the contractor is an "invitee" and as such entitled to recover from the principal employer for any injury which he may sustain by reason of the abnormally dangerous condition of the premises, only if the principal employer has and the servant has not actual or constructive notice of the existence of such condition.' *Davis* v. *Charles Shutrump & Sons Co.*, 1942, 140 Ohio St. 89, Syl. 1, 42 N.E.2d 663. There was no hidden defect or danger here. That the work of laying the flooring was proceeding simultaneously with the overhead painting was a fact as obvious to the plaintiff as to Ford."

Tomlinson was approved by the Ohio Supreme Court in *Moore* v. *Denune & Pipic, Inc.*, 26 Ohio St.2d 125 (1971), and in *Debie* v. *Cochran Pharmacy-Berwick, Inc.*, 11 Ohio St. 2d 38 (1967). The Court in *Denune* held that the rule of res ipsa loquitur was inapplicable and that the record is void of any proof of negligence, and further, that the trier of the facts was not permitted to infer that the defendant knew or should have known of the particular hazard which existed in that case.

See also *Popovich* v. *American Steel & Wire Co.*, 13 F.2d 381 (6th Cir. 1926); *Davis* v. *Charles Shutrump & Sons Co.*, 140 Ohio St. 89 (1942).

Denune, in its holding that res ipsa loquitur is inapplicable, is of particular importance here because the District Court did not submit to the jury any of the specifications of negligence, and charged the jury only on the safe place to work law. No one knows in what respect the jury found that the place to work was not reasonably safe considering all of the hazards. In the absence of proof as to negligence or as to any particular in which the defendant violated the Ohio Safe Place to Work statutes, the jury should not be permitted to guess or speculate.

We conclude that there is no liability on the part of CG&E and that the District Court erred in denying its motions for a directed verdict.

The judgment of the District Court is reversed and the case is remanded with instructions to dismiss the complaint.

APPENDIX "C"

No. 71-1090

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRANK J. TEDESCO,
Plaintiff-Appellee,

vs.

THE CINCINNATI GAS & ELECTRIC COMPANY,
Defendant-Appellant.

ORDER

(Filed November 5, 1971)

Before PHILLIPS, Chief Judge, WEICK and McCREE, Circuit Judges.

This appeal came on to be heard on appellee's "Suggestion for Rehearing In Banc and Petition for Rehearing." No Judge of the Court having requested that a vote be taken thereon, the petition for rehearing was referred to the panel for disposition.

Appellee relies primarily on *Parsons* v. *Blount Bros. Const. Co.*, 281 F.2d 414 (6th Cir. 1960), and the cases

referred to hereinafter which he asserts are inconsistent with our opinion. Such reliance is misplaced, for there is no inconsistency.

Unlike Tedesco, Parsons was not a knowledgeable journeyman lineman, and he was not working on electric lines. Parsons was an employee of a subcontractor. He was a pipefitter, working with a crane operator, moving pipe for the construction of a building. There were sagging high tension wires in the construction area carrying 18,800 volts. The boom of the crane came into contact with the live wires while Parsons was holding onto a pipe being moved by the crane, and Parsons was electrocuted. The suit was filed against the general contractor, who did nothing to correct the hazard, of which he was fully aware, and who did nothing to warn Parsons of the dangers, of which Parsons was unaware. In that case, unlike the present case, there was sufficient evidence on the issue of control to make it a question of fact for the jury to determine.

Price v. *Firestone Tire & Rubber Co.*, 321 F.2d 725 (6th Cir. 1963), was a wrongful death action brought by the estate of a truck driver whose death was caused by an explosion of a defectively mounted tire, and the case was governed by Tennessee law.

Minton v. *Southern Ry.*, 368 F.2d 719 (6th Cir. 1966), was a wrongful death action brought by the estate of a pedestrian who was struck by a train, and involved the application of Tennessee's rule of last clear chance "sometimes called the doctrine of discovered peril."

In our case, Tedesco and his employer Hoosier had just as much knowledge of the hazards as did CG&E.

It is significant here that a fellow employee of Tedesco, without Tedesco's knowledge, turned on the electrical current before the wires had been safely attached to the ceramic-insulated spools. Had the wires been attached, no injury could have resulted to the plaintiff.

Furthermore, as held by the District Court, the alleged defective rack was not being put to its intended use by the Hoosier crew.

Contrary to appellee's claim, one of the Hoosier crew did place the fuse in the transformer, (56 a). Appellee's witness and co-employee Jackson, who examined the fuse after the accident, testified that the amperage appeared on the top of the fuse. Thus, there was testimony that the Hoosier crew did install the wrong fuse. Appellee asserts, however, that inspector Vest testified on cross-examination that a 100-amp. fuse could not be inserted in the transformer. If this is true, then there is no proof before the jury that the wrong fuse was used.

Under Ohio law the doctrine of res ipsa loquitur was inapplicable. *Moore* v. *Denune & Pipic, Inc.*, 26 Ohio St. 2d 125 (1971). It was necessary for plaintiff to prove negligence on the part of CG&E, which he was unable to do.

It is clear that Tedesco had full knowledge of the hazard involved in the installation of the poles and wires, and that he did not utilize the safety equipment supplied to him by his employer for his own protection.

The petition for rehearing is denied:

ENTERED BY ORDER OF THE COURT.

/s/ JAMES A. HIGGINS
Clerk